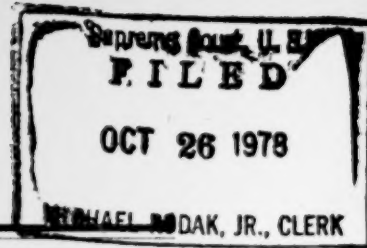


No. 78-234



In the Supreme Court of the United States

OCTOBER TERM, 1978

CYRIL J. NIEDERBERGER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 580 F. 2d 63.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1978. A petition for rehearing was denied on July 12, 1978. The petition for a writ of certiorari was filed on August 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 201(g) and 26 U.S.C. 7214(a)(2), which prohibit the receipt of gratuities by public officials

for or because of official acts, require proof that the defendant performed specific acts in exchange for the gratuities received.

2. Whether the government was required to provide use immunity for two potential defense witnesses.

3. Whether the indictment should have been dismissed because the government failed to record the testimony of the only witness appearing before the grand jury.

4. Whether the district court erred in denying petitioner's request for a special evidentiary hearing on the issue of selective prosecution.

5. Whether the indictment should have been dismissed for duplicitousness.

6. Whether the district court erred in denying petitioner's motion for severance.

7. Whether the testimony of an IRS investigator should have been stricken because the rough notes of his interview with petitioner were destroyed prior to trial pursuant to IRS guidelines.

8. Whether venue was properly laid in the Western District of Pennsylvania.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner, a government employee, was convicted on six counts of accepting illegal gratuities, in violation of 18 U.S.C. 201(g) and 26 U.S.C. 7214(a)(2).¹ He was

¹Petitioner was charged in a ten-count indictment with illegally accepting five trips from a corporation for and because of official acts performed by him. Each trip provided the predicate for two counts of the indictment, the odd numbered counts alleging violations of 18

sentenced to six months' imprisonment, to be followed by a five-year period of probation, and was fined \$5,000. The court of appeals affirmed in a thorough opinion (Pet. App. A).

The evidence adduced at trial showed that between 1967 and 1975 petitioner was a large-case manager in the Pittsburgh office of the IRS (Tr. 106, 143-144, 150). As a large-case manager, petitioner supervised the group of revenue agents assigned to audit corporate income tax returns of Gulf Oil Corporation (Tr. 146). Petitioner's responsibilities also included developing a comprehensive outline of the specific procedures to be utilized during the Gulf audit. Petitioner was authorized to make all final decisions relating to the scope and depth of the audit (Tr. 149-150, 176-177). After each audit of Gulf's tax returns, representatives of the company would confer with petitioner's staff to discuss whatever tax adjustments the auditors thought necessary.

During the period that petitioner served as a large-case manager assigned to the Gulf audits, he accepted from Gulf several golfing vacations at various resort hotels. In January 1973, petitioner spent four days at the Doral Country Club in Miami Beach, Florida, in the company of Joseph Fitzgerald, who at the time was Gulf's Manager for Federal Tax Compliance. Petitioner's bill was transferred to Fitzgerald's account and was subsequently charged to Fitzgerald's American Express card (Tr. 33-37, 109-110, 242-246). In August and September of 1973, petitioner, accompanied by his wife, spent four days at the Seaview Country Club in Absecon, New Jersey, in the

U.S.C. 201(g) and the even-numbered counts alleging violations of 26 U.S.C. 7214(a)(2). The jury acquitted petitioner on Counts I, II, IV and VI.

company of Fred Standefer, Gulf's Vice President for Tax Administration. Petitioner's expenses, and those of his wife, were billed to Arthur Harris, Gulf's Manager of Government Relations, at the Gulf Oil Building in Pittsburgh, Pennsylvania (Tr. 34-35, 46-48, 51-53, 110-111, 115). In April 1974, petitioner spent four days at the Del Monte Lodge in Pebble Beach, California, in the company of Fitzgerald and Standefer. Again, Fitzgerald charged petitioner's bill to his American Express card (Tr. 46-63). Two months later, in June 1974, petitioner and his wife were guests of Fitzgerald for five days at the Desert Inn and Country Club in Las Vegas, Nevada (Tr. 66-71, 74-75, 111-112). All of these trips coincided with the opening or closing of particular Gulf audits by petitioner's group of revenue agents (Tr. 145-157, 196).

In January 1976, IRS inspectors interviewed petitioner after first advising him of his *Miranda* rights (Tr. 104-106). Petitioner admitted receiving hundreds of gratuities from Gulf during the period from 1967 to 1975. He also admitted that he began receiving them after he assumed responsibility for the Gulf audits (Tr. 106-107). Petitioner stated that he knew that it was a criminal offense to accept these gratuities (Tr. 107, 112-113, 118, 121, 197).

ARGUMENT

1. Petitioner contends (Pet. 12) that 18 U.S.C. 201(g) and 26 U.S.C. 7214(a)(2) require that the government allege and prove "some specific official act" that he performed as the "quid pro quo" for the gratuities that he received. The indictment and proof, however, fully satisfied the requirements of these statutes, and there was no need to show a specific quid pro quo tied to each gratuity.

18 U.S.C. 201(g) forbids a public official to accept anything of value, other than lawful compensation, "for or because of any official act performed or to be

performed." 26 U.S.C. 7214(a)(2) prohibits the receipt of any compensation or reward, except as provided by law, "for the performance of any duty." The indictment in this case charged that petitioner, in his capacity as an IRS official with supervisory authority over Gulf income tax audits, received gratuities from Gulf for and because of the audits performed under his supervision. The evidence showed that petitioner received gratuities from Gulf tax executives beginning when he assumed authority over the Gulf tax returns and coinciding with the opening and closing of particular Gulf audits. Petitioner admitted that he knew that his receipt of gratuities from Gulf constituted a crime. It is obvious that petitioner was not being lavishly and expensively entertained to foster general good will. The gratuities related directly to his official action in connection with the Gulf tax audits. There was no need to trace each payment to a particular act by petitioner constituting a quid pro quo. See *United States v. Brewster*, 506 F. 2d 62, 72 (D.C. Cir. 1974), contrasting the prohibition of bribery under 18 U.S.C. 201(c) and the prohibition of gratuities under 18 U.S.C. 201(g):

The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.

Accord, *United States v. Alessio*, 528 F. 2d 1079, 1082-1083 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United*

States v. Irwin, 354 F. 2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).² Thus, petitioner's conviction under Sections 201(g) and 7214(a)(2)³ was entirely proper.

2. Petitioner next contends (Pet. 20-23) that the district court erred in not requiring the government to seek use immunity for two potential defense witnesses. This contention fails for several reasons.

By its plain terms, the federal immunity statute (18 U.S.C. 6002-6003) provides that immunity should be conferred only upon prospective witnesses who have refused to testify on the basis of the privilege against self-incrimination. Here, petitioner has made no affirmative showing that either of his proposed witnesses intended to assert the privilege. Petitioner merely asserts that these witnesses "were expected" to assert a privilege under the

²In *Irwin*, the Second Circuit explained the purpose of the broad prohibition against receiving gratuities "for or because of any official act" as follows (*id.* at 196):

The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not. * * * The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting all gifts "for or because of any official act," is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law.

³The language in Section 7214(a)(2) is parallel to that contained in Section 201(g) in that it provides punishment for any revenue officer who "receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty * * *." The court below correctly held that this provision also applies to the facts of this case (Pet. App. 10a-12a).

Fifth Amendment (Pet. 20). Petitioner was free to call them on his own behalf, but he chose not to do so. Since he did not do so and since they did not assert the privilege, the issue that petitioner seeks to argue is not presented.

Moreover, the immunity statute provides that an immunity order must be initiated "upon the request of the United States attorney" (18 U.S.C. 6003), and it is well recognized that a trial court is without authority either to immunize a prospective witness *sua sponte* or to compel the government to seek immunity. See *United States v. Allstate Mortgage Corporation*, 507 F. 2d 492, 494-495 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); *United States v. Ramsey*, 503 F. 2d 524, 532 (7th Cir. 1974); *Cerda v. United States*, 488 F. 2d 720, 723 (9th Cir. 1973); *United States v. Berrigan*, 482 F. 2d 171, 190 (3d Cir. 1973).⁴

3. Petitioner argues (Pet. 26-27) that the district court erred in denying his motion to dismiss the indictment because the government failed to record the testimony of

⁴Nor is the decision in *United States v. Morrison*, 535 F. 2d 223 (3d Cir. 1976), to the contrary. There, as a matter of due process, the Third Circuit stated that there were certain exceptional circumstances in which a district court could compel the government to confer immunity upon a prospective witness. However, *Morrison* involved serious prosecutorial misconduct. The witness decided to invoke her Fifth Amendment privilege in response to intimidation by the prosecutor (*id.* at 229). By contrast, there is no showing here that petitioner ever called Standefer and Fitzgerald as witnesses, that they ever indicated they would invoke their privilege against self-incrimination, or that the prosecutor acted to deprive petitioner of their testimony. Moreover, this is not a case where the government obtained testimony favorable to its case by granting immunity but refused the same to a defense witness who might provide exculpatory information on the same point. See *United States v. Ramsey*, *supra*, 503 F. 2d at 532-533; *Earl v. United States*, 361 F. 2d 531, 534, n.1 (D.C. Cir. 1966).

the one witness who appeared before the grand jury.⁵ This contention is meritless. There is no constitutional or statutory requirement that grand jury testimony be recorded. *United States v. Crow Dog*, 532 F. 2d 1182, 1198 (8th Cir. 1976); *United States v. Schrenzel*, 462 F. 2d 765, 772-773 (8th Cir.), cert. denied, 409 U.S. 984 (1972). In addition, even if the testimony of the witnesses who appeared before the grand jury had been recorded, the course of the trial could not have been affected; there would have been no occasion even to disclose the testimony to petitioner, since none of the government's witnesses at trial testified before the grand jury.

4. Petitioner contends (Pet. 27-31) that the district court should have held a special evidentiary hearing on his claim of discriminatory prosecution. Specifically, petitioner contends that this was the first prosecution for mere "goodwill entertainment," and that the indictment was therefore improper. As noted above, this is not a case of mere "goodwill entertainment," but rather of receipt of expensive gratuities for official action. Moreover, it is axiomatic that the government "has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). The exercise of selectivity in the enforcement of a criminal statute does not violate the Constitution. *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *United States v. Neary*, 552 F. 2d 1184, 1194-1195 (7th Cir. 1977); *United States v. Brookshire*, 514 F. 2d 786, 788-789 (10th Cir. 1975).

⁵Petitioner also asserts that he should have been allowed to examine the grand jury attendance records to determine whether the third indictment was returned by a grand jury which heard all of the evidence. This contention is without merit. "[T]he validity of an indictment is not affected by the character of the evidence considered [by the grand jury]." *United States v. Calandra*, 414 U.S. 338, 344-345 (1974).

Even if one is able to infer a policy of selective enforcement from the record of enforcement of a particular statute, it is incumbent upon the moving party to establish that "the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, *supra*, 368 U.S. at 456. Since petitioner has failed to establish even a colorable basis for his claim of discriminatory enforcement, his claim must necessarily fail.

5. The odd-numbered counts of the indictment charged that petitioner "accept[ed], receive[d], and agree[d] to receive a thing of value" from Gulf. The even-numbered counts alleged that petitioner received a "fee, compensation and reward" from Gulf. Petitioner argues (Pet. 32-34) that the district court should have dismissed the indictment for duplicity because, as a result of this conjunctive phrasing, he was charged with three separate offenses in each count of the indictment. This assertion is frivolous. It is well settled that a crime denounced disjunctively in a statute may be charged conjunctively in an indictment. *United States v. Gunter*, 546 F. 2d 861, 868-869 (10th Cir. 1976), cert. denied, 431 U.S. 920 (1977); *United States v. Lee*, 422 F. 2d 1049, 1052 (5th Cir. 1970). Despite the conjunctive phrasing, each count of the indictment charged only a single offense. Each count employed the basic statutory language and set forth the underlying facts constituting the offense. See *Hamling v. United States*, 418 U.S. 87, 117 (1974). If petitioner's argument were correct, the result would be that he could have been charged under a properly drawn indictment with even more crimes than he actually was.

6. Petitioner next contends (Pet. 37-39) that the district court erred in denying his motion for severance. He argues that the joinder of the ten counts in the indictment prejudiced him because the jury was presented

with evidence relating to all five golfing trips and that the jury was incapable of separating and distinguishing the evidence with respect to each count. This claim is also groundless. Rule 8(a), Fed. R. Crim. P., expressly provides that offenses are properly joined if they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting the parts of a common scheme or plan." Where, as here, the initial joinder is proper, a motion for severance is committed to the sound discretion of the trial court (*Opper v. United States*, 348 U.S. 84, 95 (1954)), and the court's denial of such a motion will be overturned only in those rare instances when a defendant affirmatively demonstrates clear prejudice. See, e.g., *United States v. Pacente*, 503 F. 2d 543, 545-546 (7th Cir.) (en banc), cert. denied, 419 U.S. 1048 (1974); *United States v. Carson*, 464 F. 2d 424, 436 (2d Cir.), cert. denied, 409 U.S. 949 (1972); *United States v. Sweig*, 441 F. 2d 114, 118-119 (2d Cir.), cert. denied, 403 U.S. 932 (1971). As the court below correctly noted (Pet. App. 7a), the evidence in separate trials of the several counts would be largely duplicative. Petitioner's suggestion that the jury was incapable of separately analyzing the evidence relating to each count is contradicted by the fact that the jury acquitted petitioner on four of the ten counts. See note 1, *supra*.

7. Petitioner next asserts (Pet. 40-41) that the testimony of an IRS investigator should have been stricken because the rough notes of his interview with petitioner were destroyed pursuant to routine IRS procedures prior to trial. This contention is meritless. The law in the Third Circuit with respect to the preservation and production of rough interview notes was established in *United States v. Vella*, 562 F. 2d 275, 276 (3d Cir. 1977). In *Vella*, the court of appeals held that the rough interview notes of

FBI agents should be kept and produced so that the trial court could determine whether the notes should be made available to a defendant. However, as the court below noted (Pet. App. 16a n.12), at the time of petitioner's trial the law in the Third Circuit did not require the preservation and production of such rough interview notes. The courts of appeals that now require the preservation of such notes uniformly have applied this rule only on a prospective basis. *United States v. Vella*, *supra*; *United States v. Robinson*, 546 F. 2d 309, 312 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977); *United States v. Harrison*, 524 F. 2d 421, 434-435 (D.C. Cir. 1975). Accordingly, the destruction of the investigator's notes here, which the court below found to be harmless (Pet. App. 17a-18a), did not constitute reversible error.⁶

8. Finally, petitioner contends (Pet. 35-37) that the evidence failed to show that he received gratuities in the Western District of Pennsylvania and that the district court lacked venue. This contention is groundless. When petitioner boarded airplanes in Pittsburgh to begin his round-trip flights to Miami, Absecon, Pebble Beach, and Las Vegas—trips paid for by Gulf—he then received a thing of value in Pittsburgh. In addition, 18 U.S.C. 3237(a) provides:

[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

⁶Moreover, government investigative agencies have now changed their procedures so that rough interview notes are to be retained. Accordingly, the issue presented is not likely to be of continuing importance.

Assuming *arguendo* the acts begun in Pittsburgh were completed elsewhere, the language of 18 U.S.C. 3237(a) clearly establishes that venue was properly laid in the Western District of Pennsylvania. See *United States v. Barnard*, 490 F. 2d 907, 909-912 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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